The defence of joint illegal activity must be looked at in context

In *Miller v Miller* (2011) 85 ALJR 480; [2011] HCA 9 the High Court examined the complex issue of joint illegal activity. The issue before the court was whether a plaintiff who had engaged in an illegal activity with the defendant may claim damages in negligence. In its decision the court analysed the cases of *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438, *Smith v Jenkins* (1970) 119 CLR 397, *Jackson v Harrison* (1978) 138 CLR 438 and *Gala v Preston* (1991) 172 CLR 243.

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INTRODUCTION

In *Miller v Miller* (2011) 85 ALJR 480; [2011] HCA 9 the High Court examined the complex issue of joint illegal activity. The issue before the court was whether a plaintiff who had engaged in an illegal activity with the defendant may claim damages in negligence. In its decision the court analysed the cases of *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438, *Smith v Jenkins* (1970) 119 CLR 397, *Jackson v Harrison* (1978) 138 CLR 438 and *Gala v Preston* (1991) 172 CLR 243.

BACKGROUND

The appellant was injured, aged 16 years, when she was a passenger in a stolen motor vehicle. On the day of the accident the appellant had been drinking and was trying to get home. She had no money for a taxi and the last train had departed, so she decided to steal a car. She stole a car and asked her older sister, who she knew was unlicensed and had also been drinking, to drive herself and their younger cousin home. As they left the carpark in the stolen car, the respondent, who was their uncle, stopped them and told them he would drive. Friends of the respondent also got in the car, so there was a total of nine passengers.

The respondent drove sensibly at the start of the journey but then started to speed and was not stopping at red lights. The appellant asked him to slow down and to stop to let her and her sister out. The respondent refused. The respondent lost control of the car, striking a pole. One passenger was killed and the appellant was seriously injured, becoming a tetraplegic.

At first instance, it was held that the respondent owed the appellant a duty of care and that she was guilty of contributory negligence, her responsibility being assessed at 50%.[1] On appeal it was held that the respondent did not owe a duty of care and therefore the appellant's action failed.[2] The finding of no duty was based upon the assertion that the parties had engaged in a joint illegal activity – the use of a motor vehicle without the owner's consent in contravention of s 371A of *The Criminal Code* (WA).

Special leave was granted by the High Court.

ILLEGALITY IN CONTEXT

By a majority of 6 to 1, the appeal was allowed, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivering a joint judgment (Hayne J in dissent).

Reference was made to illegality in contract and trusts to place illegality in torts "in the larger context" (at [10]). Referring to *Nelson v Nelson* (1997) 189 CLR 215, it was noted that in that case emphasis was placed upon "the discernment, from the scope and purpose of statute, of whether the legislative purpose will be fulfilled without regarding the contract of the trust as void and unenforceable" (at [27]). Their Honours stated at [27] that there are cases where a breach of the conduct required by a statute requires that other obligations associated with the conduct should not be enforced by the courts. However, the majority noted at [29] that "care must therefore be taken lest the relevant legislative intention be 'conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature'".[3]

As noted, the majority examined the main High Court decisions on joint illegal activity and decisions of the State courts after *Henwood v Municipal Tramways Trust (SA)*. A review of these cases revealed that (at [70]):

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[1] *Miller v Miller* (2008) 57 SR (WA) 358.

[2] *Miller v Miller* (2009) 54 MVR 367.

[3] Citing *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

- "the fact that a plaintiff was acting illegally when injured as a result of the defendant's negligence is not determinative of whether a duty of care is owed";
- "the fact that the plaintiff and defendant were both acting illegally when the plaintiff suffered injuries of which the defendant's negligence was a cause and which would not have been suffered but for the plaintiff's participation in the illegal act is not determinative";
- in some cases the joint participation in the illegal activity should preclude a plaintiff succeeding in negligence; and
- denying recovery in cases of joint illegal activity has been based upon a finding that no duty of care should exist, a standard of care could not or should not be fixed or that there was an assumption of the risk by the plaintiff and that denial of liability has been based upon policy judgment, either that the courts cannot or should not regulate conduct undertaken in illegal activities.

In the joint judgment, it was stated (at [72]-[73]):

> The proposition that courts cannot regulate the activities of wrongdoers has already been rejected. In a case of illegal use of a motor vehicle there is a readily identified standard of care that could be engaged: the standard of care which road users other than the driver's criminal confederates are entitled to expect the driver to observe.
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> Why should courts not regulate the activities of wrongdoers by requiring of the driver that he or she exercise reasonable care for the safety of other road users and any passenger in the vehicle, whether or not the passenger is complicit in the crime? ... the answer must lie in whether it is incongruous for the law to provide that the driver should not be using the vehicle at all and yet say that, if the driver and another jointly undertake the crime of using a vehicle illegally, the driver owes the confederate a duty to use it carefully when neither should be using it all.

To avoid incongruity, there must be analysis of the illegality, in this case, interpretation of the statute which was contravened. It was reasoned that it is "by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found" (at [74]).

In *Miller v Miller* the appellant had contravened s 371A of *The Criminal Code* (WA), taking and illegally using a motor vehicle. The majority examined the relevant provisions of the Code and the legislative history of the offence of unlawful use of a motor vehicle. It was noted that although originally unlawful taking of a motor vehicle was a relatively minor offence, it had changed over the years to become a serious crime equated with theft and associated reckless or dangerous driving led to aggravated forms of the offence (at [88]). The majority held that the change in the character of the offence was not only recognition of the increase of such offences, but was also "recognition of the dangers to life and limb that often attended the commission of that crime" (at [89]). Therefore, the legislative purposes of s 371A are not only protection of property, but also to increase road safety.

The law recognises that the probable consequence of taking and using a motor vehicle illegally is dangerous driving, that is driving "in a way that departs markedly from a standard of driving with reasonable care" (at 92]). The majority reasoned that if the illegal taking of the vehicle did result in dangerous driving, any passenger complicit in that illegal use would also be complicit in the dangerous driving and if injured, "it would evidently be incongruous to decide that the offender who drove the vehicle owed that passenger a duty to drive with reasonable care" (at [93]).

The majority stated (at [101]):

> The refusal to find a duty of care between those complicit in the offence follows from the more precise identification of the way in which the statutory proscription of illegal use of a vehicle seeks to promote road safety. The offence of illegally taking and using a vehicle is dealt with as it is because of its association with reckless and dangerous driving. The statutory purpose of a law proscribing dangerous or reckless driving is *not* consistent with one offender owing a co-offender a duty to take reasonable care. And in a case where two or more are complicit in the offence of illegally using a vehicle, the statutory purpose of the law proscribing illegal use (here, s 371A) is not consistent with one offender owing a co-offender a duty to take reasonable care. The inconsistency or incongruity arises regardless of whether reckless or dangerous driving eventuates. It arises from the recognition that the purpose of the statute is to deter and punish using a vehicle in circumstances that often lead to reckless and dangerous driving.

This approach accords with illegality in contract and trusts (at [102]).

APPLYING THE CRIMINAL CODE (WA), S 8

Section 8 of *The Criminal Code* (WA) deems that persons with a common intention to prosecute an unlawful purpose with each other have each committed the offence. Section 8(2) provides that a person is not so deemed it they withdrew from the prosecution of the unlawful purpose, communicated this to the other persons involved and took all reasonable steps to prevent the commission of the offence. The appellant had requested that the respondent slow down and let her and her cousin out of the car. The majority considered whether this satisfied s 8 as withdrawing from the prosecution of the unlawful use and taking of the vehicle even though this submission had not been made by the appellant at trial not on appeal.

The majority were of the view that the requirements of s 8 had been met as the appellant had communicated her intention to no longer participate and in the circumstances there were no reasonable steps she could have taken to prevent the continuation of the offence (at [104]). At [106] it is stated:

> Because [the appellant] had withdrawn from, and was no longer participating in, the crime of illegally using the car when the accident happened, it could no longer be said that that [the respondent] owed her no duty of care. ... When he ran off the road, he owed a passenger who was not then complicit in the crime which he was then committing a duty to take reasonable care.
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> Heydon J agreed with the majority's decision that up until the point where the appellant requested that the respondent slow down and let her out, the respondent owed no duty of care to her. His Honour disagreed with the conclusion that s 8(2) had been satisfied and that the appellant had effectively withdrawn from the joint illegal activity.

His Honour agreed that it was open for the appellant to rely upon the withdrawal argument (at [110]) but pointed out that the respondent had not conceded that the appellant had withdrawn from the joint illegal activity (at [114]). There had been no written submissions on the withdrawal argument and the only oral argument was in response to a question by a member of the court. This oral submission asserted a conclusion on the point in favour of the appellant, but said "nothing about why it should be reached" (at [117]). The respondent's counsel did not deal with the point in any further detail either and his Honour stated at [118] that this was "was scarcely surprising, since counsel for the respondent had not been put on notice that the withdrawal point would be taken in this Court".

Heydon J was clearly concerned with the lack of research and argument on the point of the appellant withdrawing from the joint illegal activity as allowed by s 8 as the "decision of the majority that s 8(2) applies in the present circumstances is the ratio decidendi of this case – the fulcrum on which the appellant's success turns. It will bind every court in this country in the law of tort and the criminal law" (at [119]). His Honour stated at [120]:

> It is a necessary condition for the carrying out of that duty of exposition and development that there be a clash of adversaries well prepared to conduct detailed forensic debate. That necessary condition was amply satisfied in this appeal by the thoughtful and full submissions of the parties in relation to the problem thrown up by the *Gala v Preston* line of cases. It was not satisfied in relation to the withdrawal point.

Heydon J held that although the appellant had indicated she wanted to get out of the car, which could be her withdrawing from the prosecution of the unlawful purpose, and this was communicated to the respondent, he did not believe that all reasonable steps to prevent the continuation of the offence had been taken (at [130]). His Honour held that it was the appellant's conduct which had rendered her unable to take any reasonable steps and therefore "it was not open to her to have contended that there were no reasonable steps she could have taken" (at 131]). As there had not been a thorough examination of the issue, it could not be said that the appellant had established the application of s 8(2).

CONCLUSION

Section 45(1)(a) of the *Civil Liability Act 2003* (Qld) provides that a "person does not incur civil liability if the court is satisfied on the balance of probabilities that the breach of duty from which civil liability would arise, apart from this section, happened while the person who suffered harm was engaged in conduct that is an indictable offence". The unlawful taking and use of a motor vehicle is an indictable offence, however it is arguable that this provision will not apply in cases where the plaintiff and the defendant are both engaged in the indictable offence. The section states "the breach of duty from which civil liability would arise" and if the situation is one where the defence of joint illegal activity applies then no civil liability would arise, it is not referring to no duty situations. Although there is no in-depth discussion of s 45 in the Second Reading Speech[4] or the Explanatory Memorandum, all references are to the scenario in which an innocent person should not be liable in damages to a person committing an indictable offence when injured.

Miller v Miller establishes that when the joint illegal activity is the unlawful use of a motor vehicle by the driver and passenger, there is no duty of care owed by the driver to the passenger and an action in negligence will fail. This is due to the characterisation of the offence and the purpose of the legislation to not only protect the property interests of motor vehicle owners but also to advance road safety as a common outcome of the offence is dangerous driving (at [89]).

However, in this case the appellant succeeded in claiming damages as the majority of the court held that she had withdrawn from the offence before the accident and therefore at that time she was no longer jointly engaged in the unlawful use of the motor vehicle. The case highlights that the legislation which makes the conduct an illegal activity must be interpreted to identify its purpose in order to determine whether that purpose requires that the law not to recognise a duty of care. It is not simply a case of there is no duty because it involves an illegal activity.

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[4] Queensland Legislative Assembly, *Parliamentary Debates*, Civil Liability Bill (2 April 2003).